DEPARTMENT OF LAW

UNIVERSITY OF PENNSYLVANIA
LAW REVIEW
AND AMERICAN LAW REGISTER
FOUNDED 1852

VOL. { 57 O. S. / 48 N. S. } JUNE, 1909 NUMBER 9

THE METHOD OF AMENDING THE FEDERAL CONSTITUTION.*

The Supreme Court of the United States has said, that the Federal Constitution, "speaks not only in the same words, but with the same meaning and intent with which it spoke when it came from the hands of its framers." This statement is so obviously sound that it seems strange that anyone should suggest that the meaning of a written instrument changes, or that it may be held to mean one thing at one time and something else at another. Nevertheless, there is a spirit abroad in our land which apparently seeks to justify a construction of the Constitution not warranted by its words, and which would read that instrument in the light of the changing conditions of the times, without regard to the real intention of its founders.

Those who are actuated by this spirit must presume that the framers of the Constitution and the people who adopted it did not understand the force of language. They differ flatly from Chief Justice Marshall, who in *Gibbons* v. *Ogden,* said: "The enlightened patriots who framed our

*An address delivered by the Hon. William P. Potter, Justice of the Supreme Court of Pennsylvania, at the annual meeting of the Alumni of the Law Department of the University of Pennsylvania, on April 23, 1909, and printed with his kind permission.

Constitution, and the people who adopted it, must be understood to have employed words in their natural sense and to have intended what they said." This is the only safe and reasonable rule to follow, and it seems almost incredible that any departure therefrom should have been suggested.

Evidently the conviction that some amendments were necessary, and knowledge of the difficulty of securing them has led to this strange attitude towards the Constitution. The feeling was perhaps most fully voiced in one of the addresses at the meeting of the American Bar Association in 1907, in which the speaker, referring to the contention of the loyal supporters of the Constitution, that if it is to be changed it must be done in the manner which the instrument itself provides for its amendment, remarked: "To say that, however, is to say that it shall not be changed at all, for we are taught by a century of our history that the Constitution can no longer be thus amended."

This was putting it very strongly. But, at any rate, it emphasizes the necessity of looking into the method of amending the Constitution with a view to learning whether or not the American people have actually tied themselves down by a provision altogether too rigid for practical purposes. If it be so, I do not believe that it is beyond the power of the American people to cure the defect. Certainly the advantages of a written Constitution are too great to be lightly surrendered. And so long as we have it, as Justice Story said, "Every word in the Constitution is to be expounded in its plain, obvious, and common-sense meaning, unless the context furnishes some ground to control, qualify or enlarge it." If the thought or wish of the people has changed in any important respect, then let the letter of the organic law be changed in the regular way, so as to give plain expression to that purpose, without resort to the dangerous method of conjecture, in order to restrict or extend it.

If, then, I ask your attention to a consideration of the method of amending the Federal Constitution, it is not

because of any shadow of a thought that any part of that great document has become obsolete, or that in its essential principles it is not a sufficient safeguard for the liberties of the people under present-day conditions. On the contrary, I believe that if any restatement of its doctrines is required, it should be in reaffirmance of the cardinal principles upon which it stands; and in particular reaffirmance of that great principle, which was an innovation in the history of government, the feature by which the people retained in their own hands the management of their own local affairs, and yet combined in such a way as to present to the outside world a united front as a nation. As Professor Stimson truly says, it was a "wonderful scheme whereby local self-government, the control by the people of their own affairs, which was, from prehistoric times, a cardinal Anglo-Saxon right, was recognized and conjoined with the powerful National Government, working directly upon the people and not upon the states, as had been the case in all other federations of history, and was the case even in our own Continental Congress. So that we, the people, manage our own domestic affairs, sue and are sued in our own courts, are tried under our local laws, while yet we have clothed the National Government at Washington with power adequate to defend the nation, maintain its dignity abroad, and duly regulate affairs of national concern."

We inherited that great original principle of the English judicial system—the right of the people to trial in local courts properly constituted in accordance with the common law and not in distant tribunals. This right is clearly recognized in the Federal Constitution, in the seventh amendment, which provides for the preservation of trial by jury in suits at common law, and prohibits any fact so tried from being re-examined in any court of the United States, otherwise than in accordance with the rules of the common law. The right of the people in the various parts of our country to administer their local affairs, without interference from any outside source, is a fundamental principle from which we, as a liberty loving nation must

never depart. John Fiske said, in his lectures on "The Critical Period of American History," "If the day should ever arrive (which God forbid) when the people of the different parts of our country shall allow their local affairs to be administered by prefects sent from Washington, and when the self-government of the States shall have been so far lost as that of the departments of France, or even so far as that of the counties of England—on that day, the progressive political career of the American people will have come to an end, and the hopes that have been built upon it for the future happiness and prosperity of mankind will be wrecked forever." I believe, however, that any such danger is remote; and that any tendency which, if allowed to continue unchecked would interfere with their right of self-government, needs only to be fairly brought to the serious attention of the American people to insure its condemnation and repudiation.

When I ask you to consider whether, in view of these pronounced tendencies to which I have referred, it is not time for the American people seriously to consider the adoption of a simpler and easier process of altering or amending the Constitution, it is not with a view to providing for any specific change, but only for the purpose of giving, upon any question that may arise, an opportunity for prompt and effective utterance to the real and substantial wish of the American people, the ultimate source of political power with us.

In a government controlled and limited by a written Constitution as is ours, the test of actual sovereignty is to be found in the power to amend the Constitution. When you ascertain where, and how, and by whom that power is exercised, you have located the source of sovereignty. It is in the people, acting at the call of two-thirds of the States, or of Congress. But you will remember that the ratification of an amendment is not by three-fourths of the people in mass; it is only by the voice of the people taken in groups—by states. And, therefore, it follows that with us the political sovereignty lies not with the people of the

Republic as a whole, but with the majority of the people in three-fourths of the States. It is that body which adopts and gives force and expression to the supreme law of the land.

To obtain an expression of the will of the people in a constitutional way is admittedly a very difficult and tedious thing. It cannot be denied that the process is so difficult that it discourages any attempt to bring about any change or alteration in the way which the Constitution itself designates. Thoughtful students of the times have not failed to note that this difficulty has brought about on the part of those who desire an enlargement of the powers of government, what seems to be an undue tendency to strain the Constitution in the direction of their desires to an unwarrantable extent. A well-grounded fear has been felt and expressed, that the difficulty of amendment is considered a sufficient excuse for seeking, through executive action and forced construction, the exercise of powers not clearly bestowed by the Constitution. Any such effort, in however good a cause, and however well meant it may be, must be repugnant to every loyal and intelligent supporter of the Constitution. Its tendency must eventually be to weaken respect for the written expression of the organic law of the nation. It has been said that "reverence for the Constitution is the choicest political virtue of a free people." If this be true, we cannot with safety consent to any lowering of our standard in this respect. President Washington foresaw the temptation and the tendency, and you will recall the solemn words in which he adjured the people to make no change in the Constitution, except in the regular and authorized way. He said: "The basis of our political system is the right of the people to make and alter their Constitution of government. But the Constitution which at any time exists, till changed by an explicit and authentic act of the whole people, is sacredly obligatory upon all. The very idea of the power and right of the people to establish a government presupposes the duty of every individual to obey the established government. * * * If,

in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this in one instance may be the instrument for good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

Yet it will not do to say that the Constitution is not capable of a certain kind of development, which may modify its working without altering its principles, and that, in a perfectly legitimate way, through the growth of customs and usages and by means of the processes of interpretation and judicial construction. But these processes must always find room to do their work within the limits pointed out in the Constitution. They can occupy and fill up the intermediate space, and round out the territory within the walls of the original grant, but never can they properly or legitimately be permitted to operate to change the boundaries. "Thus far, and no farther," is the fiat of the sovereign power. To disobey would be to place us in the same class with countries which have no authoritative Constitution.

If the limits of power are to be extended, it must not be by giving to the provisions of the Constitution a construction not reasonably within the meaning intended by its framers.

Authority for any desired change must be sought from the original source of power, the people. That such necessity will from time to time arise, is to be expected as a matter of course. It is impossible for a vigorous people, constantly growing and continuously developing their political institutions, to be governed by a system, and under an instrument, rigid and unchangeable from decade to decade and from century to century. In the very nature of things, change there must be and change there will be, to suit the altered conditions of the times. But it should

come in the authorized way, and only when sanctioned by the people.

No doubt it was with full knowledge of the previous use of the method of developing, through interpretation, the powers conferred by the Constitution, as well as their amplification through executive action, that President Roosevelt in his Harrisburg speech, some two or three years ago, pointed out what he thought was the need of additional powers in the Federal Government in order to carry out plans which he deemed essential for the welfare of the people. He frankly declared that, in his opinion, the Federal powers should be increased "through executive action and through judicial interpretation and construction of law." Evidently with the same thought in mind, Secretary Root shortly afterwards, in a speech in New York City, declared that if the people desired it, "sooner or later constructions of the Constitution will be found to vest more power in the National Government."

It is proper to assume that upon neither of these occasions was it intended to announce any startling or revolutionary doctrine. The idea, evidently, was that additional power in the desired direction might properly be obtained in one of the ways by which enlargements of the meaning and scope of the powers conferred by the Constitution have heretofore often been made. But it is just here, we have great reason to believe, that the danger lies. It is in the acceptance and perpetuation of the feeling that the regular method of amendment of the Constitution is so difficult as to be hopeless; and, therefore, to serve a good purpose, resort to the grasp of additional powers may be justified by means of a forced construction of the Constitution, and by executive action thereunder. This theory, if carried to its logical end, can only result in undermining and destroying the deliberate, emphatic expression of the permanent will of the people, as set forth in the Constitution. It would destroy all the advantage of a written Constitution, the purpose of which is, as Doctor Judson has said, "security against abuses on the part of those intrusted with political power, whether

such abuses arise from design, from incompetence, or from inadvertence. Security is found, in great part, by specific and easily accessible knowledge as to just what are the powers which officers of government are entitled to use, and particularly as to the powers forbidden."

The law, as laid down in an American Consitution, is distinguished from other forms of law only by the formal mode by which it may be changed. The Legislature which places a law upon the statute book may alter or amend the act, or may wipe it out altogether.

The court which decides a case to-day may have reason to modify or overrule its decision later on. But a Constitution is beyond the reach of court or Legislature. It speaks, as the voice of the people, and can be changed by them alone in the exercise of the sovereign power.

Mr. Bryce calls attention to the fact that in addition to the open and direct method of change by amendment, the Constitution of the United States "has been developed by interpretation; that is, by the unfolding of the meaning impliedly contained in its necessarily brief terms, or by the extension of its provisions to cases which they do not directly contemplate, but which their general spirit must be deemed to cover." In the words of Chief Justice Marshall, in *McCullough* v. *Maryland,* "the Government of the Union is acknowledged by all to be one of enumerated powers. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise as long as our system shall exist."

He points out that a government entrusted with ample powers must also be entrusted with ample means of executing those powers. For instance, the Constitution says that Congress shall have power to regulate commerce among the several States. Yet that bare permission expressed in words so few, has been construed to authorize legislation regulating navigation, the construction of public works helpful to it and to commerce, and the power to prohibit or control immigration, and to establish a railroad commission, and virtually to control all interstate traffic; its result

has been an immense enlargement of national control over all the means of transportation. Again, it clearly appearing from the Constitution that Congress has been given power to declare war, it may proceed to carry on that war by any means that may to it seem needful and proper for that purpose. And again, Congress having authority under the Constitution to borrow money, it may, if it sees proper, issue treasury notes and make them legal tender for all purposes. These are examples of the way in which the Constitution has been developed through interpretation and construction.

In the practical working of government, custom and usage, those great and ever busy sources of law are always at work with their moulding and modifying influences. Perhaps the most striking and interesting instance of this is the fact that through usage, and usage alone, the presidential electors have lost the right given to them by the Constitution of exercising their own discretion in the choice of president and vice-president.

It must also be acknowledged that at times those upon whom was placed the responsibility of directing the affairs of the Government have thought it absolutely necessary to overstep the limits of their authority and act without the sanction of the Constitution; but this has only occurred under the stress of great emergencies, and to accomplish great and essential ends; and no such action can justly be cited as a precedent for usurping authority under any ordinary conditions.

Professor Bryce closes a chapter upon the Interpretation of the Constitution of the United States by saying: "The interpretation which has thus stretched the Constitution to cover powers once undreamed of, may be deemed a dangerous resource; but it must be remembered that even the Constitutions which we call rigid must make their choice between being bent and broken. The Americans have more than once bent their Constitution in order that they may not be forced to break it." The truth of this comment will be apparent to everyone who attempts to

trace the course of our national growth. What Professor Bryce had especially in mind was the necessities of the Civil War times, when men openly said that they would break the Constitution in order to preserve the Union. He cites a remarkable letter of President Lincoln, written in 1864, in which he says: "My oath to preserve the Constitution imposed on me the duty of preserving by every indispensable means that government, that nation, of which the Constitution was the organic law. * * * I felt that measures, otherwise unconstitutional, might become lawful by becoming indispensable to the preservation of the nation. Right or wrong, I assumed this ground and now avow it. I could not feel that to the best of my ability I had even tried to preserve the Constitution, if, to save slavery or any minor matter, I should permit the wreck of Government, country and Constitution altogether." It was this thought, no doubt, which impelled the doing of things which were justifiable only upon the ground that they were war measures and necessary to preserve the life of the nation.

Another extraordinary example of exceeding, in executive action, the limits of the Constitution in a matter of vast commercial importance, but not involving the national integrity or existence, was the purchase of the Louisiana territory by President Jefferson. He frankly acknowledged that the necessities of the case had impelled him to go beyond the law. While the matter was pending in Congress he said: "The Constitution has made no provision for our holding foreign territory, still less for incorporating foreign nations into our Union. The executive, in seizing the fugitive occurrence which so much advances the good of the country, has done an act beyond the Constitution." But he was not willing to stand simply upon the ground that it was a proper case for breaking a rule without discrediting it, or to rely upon the principle that there are exceptions to all rules, for he was anxious that there should be a formal approval by the people in the shape of a constitutional amendment. He drew one up and inti-

mated to his friends in Congress that he hoped to see it adopted. But neither Congress nor the people seemed to be sensitive upon the subject, and little interest was taken in the matter and it was allowed to drop.

When the Constitution was adopted by the people they said it should stand till "we, the people," by amendment alter it. It is also true that since that time scores of questions have arisen which its framers could never have anticipated in any way. Political ideas, like other forms of thought, are the result of continued growth and accumulated experience. A written or rigid Constitution, however general its terms may be, is the expression of those ideas at a particular time; and if this safeguard is to be preserved for the people some method of altering it so as to keep it in touch with the times and enable it to conform to changes in circumstances and ideas, is indispensable. The men who sat in the Federal Constitutional Convention of 1787 never supposed that their work was to stand for all time as they left it, without change or alteration, and they very naturally undertook to provide a way by which, as it seemed to them, their work could with reasonable ease be changed or amended. It is evident, also, from their speeches in the convention and from their subsequent comments upon the subject, that they expected that the method of amendment which they provided would be freely used. Our own James Wilson, after pointing out that no alteration in the Constitution can be made by the Government, because such an alteration would destroy the foundation of its own authority, goes on to say: "As to the people, however, in whom the sovereign power resides, the case is widely different; from their authority the Constitution originates; for their safety and felicity it is established; in their hands it is as clay in the hands of the potter; they have the right to mold, to preserve, to improve, to revise and to finish it as they please. If so, can it be doubted that they have the right likewise to change it? A majority of the society is sufficient for this purpose."

Such was Wilson's view. And no man understood bet-

ter than he the principles upon which our form of government is founded, and he says further in this connection: "A proper regard to the original and inherent and continued power of the society to change its Constitution will prevent mistakes and mischiefs of very different kinds. It will prevent giddy inconstancy; it will prevent unthinking rashness; it will prevent unmanly languor. Some have appeared apprehensive that the introduction of this principle into our political creed would open the door for the admission of levity and unsteadiness in all our political establishments. The very reverse will be its effect. Let the uninterrupted power to change be admitted and fully understood, and the exercise of it will not be lightly or wantonly assumed." Thomas Jefferson, in writing to Madison from Paris in 1789, expressed the opinion that every generation ought to make its own Constitution. He suggested that no society can make a perpetual Constitution, or even a perpetual law. The earth belongs always to the living generation.

Certainly the desire and intention of the framers of the Constitution to provide appropriate and sufficient means for its reasonable and orderly amendment cannot be doubted or misunderstood. Nor can the further fact be overlooked that they very much feared any attempt to change or alter the Constitution, except in the regular and authorized way. They evidently would have regarded any such attempt as flat usurpation, and they certainly did not anticipate that the time would ever come when any real or supposed difficulty in the process of amendment would be made an excuse for seeking, through executive action or strained judicial interpretation, powers not conferred by the Constitution. Nor would they have had any sympathy with the views of those who regard the Constitution as partaking in some degree of the expansive nature of the common law, which continually follows the growth of the people, and is always being adapted to their needs. This view results from confusion of thought, and loses sight of the fundamental distinction between the law of the

Constitution, and the law of the Legislature and the courts. The law of the Constitution is in all its essentials above and beyond the reach of the Legislature or court, and speaks with binding authority to both.

In an address by Mr. Justice Brewer, of the United States Supreme Court, delivered a few years ago before the Virginia Bar Association, he sounded a clear note with regard to the proper limitations of the courts. He said: "We often hear the declaration that something more than a knowledge of the law is necessary for a successful judge; that he should be endowed with the spirit of constructive statesmanship. By this and other ways there is expressed the thought that the new conditions of life call upon the court to give a new and different meaning to the language of the Constitution; a meaning larger and broader than that which, according to the rule so clearly stated by Chief Justice Marshall, was the meaning of the framers of the Constitution and the founders of the Government. * * * I know that there are changed conditions and a different social and business life from that which obtained when the Constitution was framed. It may be that new laws are necessary, possibly amendments to the Constitution; but it must always be remembered that this is a Government of and by the people, and if additions and changes are necessary, let them be made in the appointed way. Never let the court attempt to change laws or Constitution to meet what they think present conditions require. When they do this, they clearly usurp powers belonging to the Legislature and the people."

I think we will all agree that any attempt to strain the language of the Constitution so as to make it mean anything that will suit our purpose, is both intellectually and morally wrong. The question will naturally be asked why it has been thought necessary to resort to indirect and circuitous methods in order to keep the Constitution abreast of the age. If changes are needed, why was it not suggested that they be made in the regular and lawful way? No other answer can be given than the extreme practical

difficulty of making use of the regular and authorized process of amendment. Yet it is very clear that this result was never anticipated or intended by the fathers of the Republic.

In the Federal Constitutional Convention, the first suggestion as to the method of amendment was that the Constitution might be changed without requiring the consent of the National Legislature. The committee of detail, in its first draft of the instrument, proposed that a convention should be called by Congress after application by the Legislatures of two-thirds of the States; but nothing was said as to whether the Legislatures were to propose amendments and the convention was to adopt, or whether the convention was to do the whole thing—propose and adopt; nor did the method of amendment, as proposed by the committee of detail, enable Congress to call a convention on its own motion. Hamilton opposed this plan because he thought it inadequate and he wished an easier method of amendment adopted. Madison objected on account of the vagueness of the plan. The result was that Madison brought forth as a substitute the plan which, with some modifications, became Article 5 of the Constitution. It is as follows: "The Congress, whenever two-thirds of both Houses shall deem it necessary, shall propose amendments to this Constitution; or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which in either case shall be valid to all intents and purposes as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congerss; provided that no amendments which may be made prior to the year one thousand eight hundred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate."

It will be noticed that no opportunity is afforded for taking the direct verdict of the people.

As was expected, it was not long until the process of amendment was put to the test. For the Constitution as a whole was probably not entirely satisfactory to any member of the convention that framed it. From beginning to end, it was a series of compromises. But it was the best that could be had under the circumstances. It was ratified by the requisite number of States only after long and in some cases critical discussion; and with the practical understanding that a number of amendments should be promptly made. And they were. The first ten amendments were proposed by Congress in September, 1789, so that they were practically part of the original Constitution. The next occasion for putting into motion the amending machinery arose out of the decision of the Supreme Court, in *Chisholm* v. *Georgia,* holding a State liable to be sued by a citizen of another State, and it resulted in the adoption of the eleventh amendment, declaring that a State should not be subject to such a suit. It was proposed by Congress in March, 1794, and declared in force in January, 1798. Then came the twelfth amendment, requiring the electors to vote for president and vice-president, and virtually recognizing the existence of political parties. This amendment was proposed in December, 1803, and declared adopted in September, 1804. More than sixty years then passed until the thirteenth, fourteenth and fifteenth amendments, as a result of the Civil War, completed the list as it stands at the present time.

It is well nigh forty years since the last change was made. Yet the effort to procure amendments has been almost continuous. Anyone interested in the subject may find a mine of information in the valuable monograph on the "Proposed Amendments to the Constitution, During the First Century of Its History," by Professor Ames, of the University of Pennsylvania. His painstaking investigation shows that more than eighteen hundred propositions looking to the amendment of our fundamental law were

made during the first one hundred years of the Constitution; and aside from the fifteen which were adopted, only four of these propositions succeeded in getting through both Houses of Congress. The reason for the failure of so great a number of attempts, Professor Ames says, is, "in part because some were suggested as cures for temporary evils, others were trivial or impracticable, still others found a place in that unwritten Constitution which has grown up side by side with the written document; but the real reason for the failure of those other amendments which have been called for repeatedly by the general public has been due to the insurmountable constitutional obstacles in their way."

Certainly, the expectation of the Fathers of the Republic, that the method of amendment which they provided would be satisfactory, has not been fulfilled. The process suggested in the instrument itself has proven to be too difficult and complicated in practical application to be fairly workable. This became apparent long ago; for in the last case in which Chief Justice Marshall discussed a constitutional question, *Barron* v. *Baltimore,* of January Term, 1833, he referred to the machinery for procuring an amendment to the Constitution as being "unwieldy and cumbrous."

Time and growth of the country, and a vast increase in population have added to the difficulty. When the Constitution was adopted, three-fourths of the States meant nine; now it means thirty-four. Then an amendment meant an appeal to a comparatively compact population, largely of Anglo-Saxon descent, with an inherent genius for self-government and imbued strongly with the ideas of liberty, and tenacious of the rights of the individual under the common law. Now the adoption of an amendment means reaching and convincing the leaders of a vast population, scattered over an immense area, many of them having behind them no heritage of free constitutional government. The success of a proposed amendment calls for united action by so many groups of people; the process is

so slow and so complex, and so liable to be interfered with while under way, that it comes very near the impossible, except where there is the most intense conviction upon the part of a majority of the people. With the rapid increase of population and the consequent increase in the membership of Congress and in the number of States, the difficulty of using effectively the authorized process of amendment has greatly increased until, as President Woodrow Wilson has well put it, "No impulse short of the impulse of self-preservation, no force less than the force of revolution, can nowadays be expected to move the cumbrous machinery of Article 5."

Yet, to change or alter the Constitution in any other way means usurpation and disloyalty to the supreme law of the land, to which we have all sworn allegiance. What, then, is to be done? Obviously, but one thing—amend the article of the Constitution which governs the process of amendment.

The provision, however, that no State shall without its consent be deprived of its equal suffrage in the Senate, must stand. Under the existing fundamental law, that clause cannot be touched, without the consent of every State in the Union, and to that extent it must remain as a prohibition upon the power of amendment. But except as to that particular feature, sound reason and enlightened political science unite to justify the adoption of a new method of amendment. Why should it be thought necessary, in order to accomplish some good purpose, to strain the Constitution or go beyond the plainly expressed intention of its framers? Why should we even be willing to remain in doubt as to what those intentions really were? It is not as though the oracle which spoke when the law was given had become a dumb, unresponsive thing. Not at all. We have with us at all times the living oracles. We need only to consult the will of the people to ascertain whether any fundamental change is desired. It is not as though the revelation of the people's will had been given but once, for all time, and we were, therefore, bound by

painful exegesis and exacting analysis to ascertain at our peril the meaning of every word and phrase used.

The Constitution ought not to be regarded as though it were the last will and testament of the only body capable of making a plan of government for the American people. Yet we seem to have treated it in just that way. We have apparently lost sight of the fact that the nation is in full and vigorous existence, virile, growing and expanding from decade to decade, and just as capable of knowing its own mind as to what it desires as ever it was, and just as capable of giving expression to those desires.

How, then, shall the immobility of the Federal Constitution be remedied? How shall the amendment article be amended so as to carry out the real purpose and intent of its framers? The question may be answered in the most natural way, by availing ourselves of our own experience in a field in which the American people have not allowed themselves to be hampered in the expression of their fundamental political ideas, and where their genius for self-government has been developed to the best advantage; that is, in the adoption and amendment of the Constitutions of the various States of the Union; for it is to that quarter that the student of constitutional law must turn if he wishes to know what the American system really is. Doctor Borgeaud, a keen student of the provisions of written Constitutions, says that European critics of American democracy almost always make the mistake of looking only at the Federal Constitution of the United States, and of leaving unexamined the Constitutions of the several States. Professor Bryce also has shown that the institutions of the States are the real foundation of the national institutions. He says: "It has been truly said that nearly every provision of the Federal Constitution that has worked well is one borrowed from or suggested by some State Constitution; nearly every provision that has worked badly is one which the convention, for want of a precedent, was obliged to devise for itself."

If we find, then, that the method by which the greater

part of the State Constitutions may be amended has worked well, it is reasonable to suppose that substantially the same plan will give satisfaction to the same people, when grouped together in the consideration of national affairs. It was in Connecticut, in 1818, that the method of amendment seems to have originated, which has since become the predominant system throughout the Union, so that it may well be called the American system. Its essential requirement is that the genuine voice of the people shall be heard, speaking not through representatives in convention, but at the polls, in direct affirmance or rejection, of the propositions submitted for adoption as part of the fundamental law.

The Hartford Convention provided that a majority of the Legislature of the State might propose alterations and amendments to the Constitution, which proposals should then be continued to the next General Assembly; and if then approved by two-thirds of each House, the amendment was to be submitted to the electors of the State, and if approved by the majority of them, the amendment was to be valid as part of the Constitution. Substantially the same article was soon after incorporated into the Constitution of Maine. That State, however, did not retain the test of two Legislatures as to the initiative, but was satisfied with the adoption of a proposal by a single Legislature, by a two-thirds majority of each House, to authorize the submission of an amendment to the people. Then in 1820, Massachusetts, on the proposal of Daniel Webster, fell into line and adopted substantially the same article, substituting, however, a simple majority in the place of a two-thirds majority, in the action by the Senate. The next year, in 1821, the State of New York recognized the principle of ratification of the Constitution directly by the people. Virginia followed; then came South Carolina and North Carolina; and in 1836 the principle was included in the Constitution prepared for the State of Michigan, prior to its admission to the Union.

And then, in 1838, came our own Pennsylvania Consti-

tutional Convention, which in its plan for amending the Constitution provided for the submission to the people of a proposition, when passed by a simple majority of two successive Legislatures, and to become a part of the Constitution when ratified by a majority of the qualified voters of the State. And that provision, as you know, was retained practically unchanged in the present Constitution. The principle has amply vindicated itself throughout the Union, and it is safe to say that the making or amending of a Constitution would not now be considered complete unless it included the sanction of the people at the polls in the final enactment or rejection of the proposition submitted.

The details of the process vary somewhat in the different States. According to the latest information I have been able to get, seventeen of them require the vote of two-thirds of one Legislature to initiate, and a majority of the people voting, to enact or adopt. Ten States, of which Pennsylvania is one, require the vote of a majority of two Legislatures and a majority of the people voting. Seven of the States require the vote of three-fifths of one Legislature, and a majority of the people voting. In four States, the vote of a majority of one Legislature is required before submission to the people. Two States, Connecticut and Tennessee, require the vote of a majority of one Legislature, and a two-thirds vote of the next succeeding Legislature, before submission to the people. In so far as my examination has gone, South Carolina is the only State which requires a two-thirds vote of two Legislatures and a majority of the people. In Rhode Island a vote of three-fifths of the people is required, after a majority of two succeeding Legislatures has passed upon the proposed amendment. Massachusetts requires the vote of a majority of the Senate, and of two-thirds of the House of two succeeding Legislatures, and a majority of the people. While Vermont's requirement is the vote of two-thirds of the Senate and a majority of the House, of one Legislature, and a majority of both Houses of the next Legislature,

before submitting the proposition to the people. New Hampshire votes every seven years upon the question of whether a convention to revise the Constitution shall be called, and if one is called, any proposed alterations must be approved by two-thirds of the qualified voters. But her Legislature has no voice whatever in the process. Delaware goes to the opposite extreme and allows the Legislature to do all the work of amendment, and the people have no direct voice in the matter. Possibly, some of the States have in late years made changes that I have not been able to note or examine. But in most of the States, I think it is safe to say, that a simple majority of those voting is sufficient, when it comes to the final enactment of an amendment.

Merely by way of suggestion, I would say that, applied in its simplest form to the amendment of the Federal Constitution, this method, which is so general that it may fairly be called the American system, would perhaps mean the proposal of an amendment in either House of Congress, agreement thereto by a majority of each House, then its submission to the people and ratification by a majority of the qualified voters in a majority of the States.

A method of amendment, involving substantially these features, would open the way for the practical application of the principle affirmed by that profound constitutional lawyer, Daniel Webster, when in the Massachusetts Convention of 1820 he said: "I know of no principle that can prevent a majority, even a bare majority of the people, from altering the Constitution."

No careful student of the methods of the American people will feel that there is any reason to fear hasty action when it comes to changing the organic law. Taken as a whole, the conservative instinct of our people is very great. Even when the need for action is clear, the inertia of the mass is very difficult to overcome.

Certainly, the authorized method of amending the Federal Constitution should permit the people to signify and enact with reasonable ease, as part of the fundamental law,

any permanent change in the form of their political thought. And in doing this, I can conceive of no safer way than to follow the general system which has been well tested by, and has given wide satisfaction to, the same American people, in performing the same office in the various States of the Union.

But whatever the method of amendment may be, I am sure we will all agree that loyalty to the Constitution, the supreme law of the land, demands that every lawyer, at least, shall stand fast in support of its plainly expressed provisions until they are altered in the legitimate and authorized way set forth in the instrument itself.

Every student of American history must realize that the Republic has had in the past the benefit of the best thought of its best men. It is entitled to the same service to-day, and it needs that service as much as ever it did. Its lawyers, its professional men of every type, its business men, should know no higher duty or greater privilege than the service of our common country, in helping to solve the problems of self-government. Such service ought not to be regarded as a sacrifice; but if so, then should it be, indeed, a willing sacrifice.